Supreme Court, U.S.
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No. 98-1935

In The

Supreme Court of the United States

DEJA VU OF NASHVILLE, INC., JOHN CHRISTOPHER COX, GOOD TIMES, INC., DENISE BENSON, DELAINA A. CAISE, JAMES CORBETT CHICK, d/b/a THE BRASS STABLES, C&A ENTERTAINMENT, INC., AND DAWN PIERCE,

Petitioners,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; ROBERT E. KIRCHNER, JR., CHARLES W. BURSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY OF PETITIONERS TO BRIEF OF PAUL G. SUMMERS IN OPPOSITION

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REPLY OF PETITIONERS TO BRIEF OF RESPONDENT PAUL G. SUMMERS IN OPPOSITION

Respondent raises four substantive reasons why this Court should not grant certiorari in this matter. However, the issues raised by the Respondent highlight why this Court should grant review here, why this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) fails to provide a proper analytical framework in which to evaluate regulations such as the one enacted by the State of Tennessee, and why this case will permit this Court to ultimately resolve a host of issues that are in conflict in the inferior courts and which either will not, or may not, be resolved by review of *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *cert. granted*, ___ U.S. ___, 119 S.Ct. 1753, 143 L.Ed.2d 786 (May 17, 1999, No. 98-1161).

I. THE CONSTITUTIONALITY OF TENNESSEE'S RESTRICTIONS ON PUBLIC NUDITY IS IN DOUBT UNDER ANY OF THE THREE OPINIONS CONCURRING IN THE *BARNES* JUDGMENT.

The actions by the City of Erie (in *Pap's*) and the State of Tennessee (here) reveal two very different and distinct approaches to drafting anti-nudity legislation. The Erie ordinance contains virtually no significant exceptions to the "across the board" prohibition of public nudity, while the Tennessee statute includes a litany of exemptions from its criminal proscriptions (see petition, pp. 3-4; App.[1] 128-130; and brief in opposition, p. 3). This facial

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[1] "App." shall refer to the appendix attached to Deja Vu of Nashville, Inc.'s petition, while "R. App." shall refer to the appendices attached to this reply.

gerrymandering of the Tennessee legislation distinguishes this case from *Pap's*, requires a different constitutional analysis in order to evaluate the legitimacy of the regulation, and renders the law significantly constitutionally suspect under both the *Barnes* plurality opinion and the concurrence authored by Justice Scalia. And, for the reasons as set forth in Section II, *infra*, the legislation is suspect under Justice Souter's approach in *Barnes* as well.

In *Barnes*, the plurality opinion authored by the Chief Justice and joined in by Justices Kennedy and O'Connor predicates its result on the basis that the Indiana statute at issue there was a neutral law of general applicability. "Indiana, of course, has not banned nude dancing as such, but has proscribed public nudity ***across the board***." *Barnes*, 501 U.S. at 566 (emphasis added). As the Chief Justice observed:

> "The perceived evil that Indiana seeks to address is not erotic dancing, but public nudity. The appearance of people of all shapes, sizes, and ages in the nude at the beach, for example, would convey little if any erotic message, yet the State still seeks to prevent it. Public nudity is the evil the State seeks to prevent, whether or not it is combined with expressive activity."

Id. at 571. Because of its numerous exceptions, the Tennessee statute does not therefore fall within the parameters of a justifiable law of general applicability as articulated by the plurality opinion. In fact, Ch. 542 is the antithesis to the neutral law of general applicability at issue in *Barnes*.

Nor does the Tennessee statute pass muster in regard to the *justification* for such a regulation as articulated by the *Barnes* plurality: The protection of societal order and

morality. *Barnes*, 501 U.S. at 568-569. It is difficult to comprehend how, for example, allowing minors to view group public nudity in a "family-oriented clothing optional facility" or even nude dancing performed by an amateur theatrical company "which has serious artistic merit" would ***not*** be detrimental to public morality, while permitting nude expressive dance entertainment to be viewed ***only*** by consenting ***adults*** would be morally repugnant.

Such exemptions to these moral concerns should render Ch. 542 otherwise unconstitutional. *See, e.g., City of LaDue v. Gilleo*, 512 U.S. 43, 52 (1994) ("exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place"); *The Florida Star v. B.J.F.*, 491 U.S. 524, 540-542 (1989) (a law banning First Amendment activity by some but not by others "cannot be defended on the ground that partial prohibitions may effect partial relief"); and *Church of Lukumi v. Hialeah*, 508 U.S. 520, 546-47 (1993) (where government "restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling" and the law "cannot be regarded as protecting an interest 'of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited' ").

In this regard, Justice Scalia's concurrence is not significantly different. He observes that were it the case that the State had in practice targeted only expressive nudity,

while failing to regulate various aspects of non-expressive conduct (giving examples of nude beaches and unclothed perveyors of hot dogs and machine tools), "it might be said that what posed as a regulation of conduct in general was in reality a regulation of only communicative conduct." 501 U.S. at 574. He observed, however, that in *Barnes* there was "no evidence of that." *Id.* Here, to the contrary, the language of the Tennessee statute itself evidences such a targeting of communicative conduct, which pursuant to Justice Scalia's concurrence should render such a regulation content-specific and therefore subject to strict scrutiny. Chapter 542 therefore appears to fail under his analysis as well.

Succinctly put, the State of Tennessee has not "proscribed public nudity across the board" as Indiana had (and as the City of Erie has) done. Accordingly, contrary to the assertion made by the Respondent (brief in opposition, p. 10), the analysis that this Court will undertake in *Pap's* will not necessarily resolve the question of the constitutionality of such a legislatively gerrymandered regulation. Review of the Sixth Circuit opinion at issue here is therefore warranted.

II. SECONDARY EFFECTS.

The arguments of the Respondent, and indeed the appendices attached to his brief in opposition, well exemplify why this Court should review the decision of the Sixth Circuit in order to determine whether Justice Souter's lone concurrence in *Barnes* has so fundamentally altered the secondary effects doctrine of *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and the intermediate scrutiny test as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), that they are now virtually meaningless dicta.

The Respondent states that in the district court proceedings, the State "asserted that caselaw and experience of other jurisdictions, including studies, link such adverse secondary effects to adult-oriented business establishments." Brief in opposition, p. 12. Respondent then cites to his appendix, which is a "brief" – submitted after oral argument on the cross-motions for summary judgment – regarding the supposed relevance of a 338 page "packet" of "secondary effects studies" laid before the District Court by the State. What the Respondent has failed to acknowledge to this Court is that those materials were subject to a motion to strike them as being irrelevant; a motion that goes to the very heart of the secondary effects arguments raised by these Petitioners.

The transcript of the oral argument in regard to that motion, attached hereto as R.App. 1-9, establishes that these materials were not before the Tennessee legislature at the time of enactment of Ch. 542, but were rather produced in connection with a different lawsuit concerning a different and subsequent statute. R.App. 2, 4-5. In fact, these materials were not submitted to the Tennessee legislature until, at the earliest, a year after enactment of Ch. 542. R.App. 4-5. The District Court noted that this submission was akin to throwing "a lot of stuff up against a wall" and hoping that something would stick. R.App. 8. These circumstances illustrate the fundamental problems in regard to the supposed extension of the secondary effects doctrine "required" by Justice Souter's concurrence in *Barnes*, and warrant this Court reviewing the decision below.

First, such a circumstance eviscerates the command as authored by the Chief Justice in *Renton* that a municipality need not conduct new secondary effects studies before enacting legislation "so long as whatever ***evidence***

the City ***relies upon*** is ***reasonably believed to be relevant*** to the problem that the City addresses." 475 U.S. at 51-52 (emphasis added). With the decision of the Circuit Court here, there is no longer a requirement of either "evidence" or "reliance" (whether reasonable or not).

Second, such a result appears to be contrary to the decision in *United States v. Virginia*, 518 U.S. 515, 533 (1996), where this Court concluded that the governmental justification for a regulation "must be genuine, not hypothesized or invented *post hoc* in response to litigation." This requirement appears to neatly fit within the dictates of *Renton* (regarding reasonably relied upon evidence), but is completely disregarded by engrafting Justice Souter's analysis in *Barnes* onto the *Renton* secondary effects doctrine.

Third, the mere "throwing against a wall" of secondary effects studies utilized to substantiate zoning regulations, as a basis of validating anti-nudity regulations, renders the second and fourth prongs of the *O'Brien* test to be meaningless. As long as some studies might have, at some point, substantiated some type of secondary effects being associated with some type of "adult" business, the government need not establish either that the regulation ***furthers*** an important or substantial governmental interest, or that the infringement on First Amendment freedom is no greater than is ***essential*** to the furtherance of that interest. *O'Brien*, 391 U.S. at 377. A district court, however, recently eschewed a municipality when it attempted to do as the State of Tennessee has done here:

> "The studies relied upon by the City here, however, do not address the connection between coownership of a booking agency and a nude dancing establishment [the subject of the regulation] and prostitution. Rather, these studies support no more than the proposition that nude

> dancing establishments alone may be associated with certain crimes, including prostitution. ***Furthermore, these studies focus only on the efficacy of land use and zoning schemes in reducing crime. None documents, or even mentions, the efficacy of an ordinance of the type enacted by the City of Bangor in reducing prostitution or any other crime.***"[2]

Diva's, Inc. v. City of Bangor, 21 F. Supp.2d 60, 65 (D. Maine 1998) (emphasis and clarification added).[3]

Similarly, here, neither in the District Court, nor in the Circuit Court, nor even in this Court, does the State of

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[2] Because this Court in *Renton* determined that zoning regulations of adult businesses pass the second and fourth prongs of the *O'Brien* test, they actually should have the tendency of ameliorating supposed secondary effects. If that is the case – and it has to be in order for a zoning regulation to pass constitutional muster – then this District Court is correct in its analysis of ignoring the "secondary effects studies" that were prepared in order to ***enact*** zoning regulations. The zoning laws are assumed to work, and it is therefore improper for the government to simply rely upon these "studies" for enacting further legislation without first analyzing how effective the zoning laws have been in reducing any adverse secondary effects.

[3] On the other end of the spectrum is the recent decision in *Dima Corporation v. Town of Hallie*, ___ F.3d ___, 1999 WL 538176 (7th Cir. (Wis.)), where the court there noted, in apparent contravention to the clear dictates of *O'Brien*, that the judiciary's role is not to determine the "objective truth" of whether or not secondary effects exist or whether a specific regulation (an hours of operation ordinance there) would ameliorate the same. *Id.* at *7. *Dima* further exemplifies that the extension of the secondary effects doctrine supposedly "required" by Justice Souter's concurrence in *Barnes* (*see Dima* at *5) should be reviewed by this Court, and this case is an appropriate vehicle to do so.

Tennessee attempt to explain how requiring entertainers to wear pasties and g-strings will ameliorate any supposed secondary effects, or, more importantly, how the "studies" presented to the District Court establish this nexus. This utter lack of respect for the dictates of *Renton* and *O'Brien* warrant this Court granting review of this matter.

III. SUBSTANTIAL OVERBREADTH AND THE "THEATRICAL" EXCEPTION.

Whatever else *Barnes* may hold, it is clear that eight of the nine Justices agreed that nude performance dance entertainment, *in "adult" establishments*, is a form of expression that is protected by the First Amendment. Accordingly, if the Tennessee statute impermissibly precludes the Petitioners or others from engaging in this form of entertainment, the regulation is overbroad; and substantially so. After all, the State of Tennessee believes that the nudity component of certain "theatrical" productions is so essential as to convey the intended message, that such entertainment must be exempted from the proscriptions of Ch. 542 in order to save the regulation from overbreadth attack. *See, e.g.*, brief in opposition, p. 16. The importance of this expressive component to Petitioners' entertainment cannot then be minimized.

The Respondent dismisses the Petitioners' arguments in regard to the "theatrical exception" (totally ignoring the vagueness concerns), by asserting that "any rational reading of Chapter 542 indicates that the theatrical production exception is grounded in a finding that the deleterious secondary effects" are associated with such things as the clubs at issue and not "with theatrical productions

such as those described" in the Tennessee statute. Brief in opposition, p. 16. Regardless of any intent of the statute to target secondary effects, however, if the Petitioners' performances fall within the theatrical exception, they are nevertheless relieved of the restrictions of Ch. 542.

In addition, the Respondent's argument that the constitutional challenges to the theatrical production exception are not ripe (brief in opposition, p. 16), is without merit. With the exception of a request for declaratory relief (to determine that the Petitioners fell within that exception), both the District Court and the Circuit Court fully addressed the constitutional challenges to this exception. App. 8, 29-31, 38-41, and 45-47. The Respondent is simply then in error when he asserts that the consideration of this exception "at this point would thus be without the benefit of any lower court findings or analysis, and could well become merely an academic exercise." Brief in opposition, p. 16.

IV. REVIEW IS NECESSARY TO DETERMINE THE EFFECT OF SUCH A REGULATION ON THE CONTENT, SUBSTANCE, AND "MESSAGE" OF EROTIC PERFORMANCE DANCE ENTERTAINMENT.

Respondent attempts to contort the argument of the Petitioners in this regard by asserting that this case does not turn on the issue of whether or not nude dancing is entitled in the first instance to First Amendment protection. Brief in opposition, p. 17. Respondent is correct in *that* assertion, but ignores the fundamental argument raised by Petitioners at pp. 27-30 of the Deja Vu petition; that being the fundamental question of what effect, if any,

do these type of regulations have upon the content, substance and in fact "message" of erotic performance dance entertainment? There was no evidence for this Court to analyze this concern in *Barnes*, and there is nothing in the record in *Pap's* regarding the same. However, the record here contains sufficient evidence for this Court to properly adjudicate this issue either pursuant to strict scrutiny or in regard to the fourth prong of *O'Brien*.

V. CONCLUSION.

The arguments of the Respondent should be rejected and the petition for a writ of certiorari by the "Deja Vu" Petitioners should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

IN RE:	)	
	)	No. 3:94-1031
TENNESSEE PUBLIC INDECENCY STATUTE	)	
	)	

BEFORE THE HONORABLE ROBERT ECHOLS, JUDGE

TRANSCRIPT

OF

PROCEEDINGS

March 25, 1996

Motion Hearing

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* * *

[p. 3] The above-styled cause came on to be heard for a motions hearing on March 25, 1996, before the Honorable Robert Echols, Judge of the United States District Court for the Middle District of Tennessee, when the following proceedings were had, to-wit:

THE COURT: Okay, we're here again in the case of In Re State of Tennessee Public Indecency Statute litigation. This is a multidistrict litigation involving cases filed in several courts. It's been consolidated in this case by the multidistrict panel. It has as its number Civil Action 3:94-1031.

The case is scheduled today for oral argument on several motions for summary judgment filed by the

defendants as well as cross summary judgments filed by the plaintiffs.

* * *

[p. 4] The plaintiffs have moved to strike certain material offered by the government, saying that it is not relevant to this case nor is it responsive to the local Rule 8 (b) (7) (C) which is required to be filed by parties filing summary judgment motions and says further and more specifically that the 338 pages of material are apparently studies that were produced in connection with a separate case in Knoxville, all of which is not relevant and should not be admitted in this case.

* * *

[p. 10] Next the plaintiffs move, as I referenced earlier, to exclude this filing of exhibits. Does the government want to respond to that? I don't have those exhibits at hand. I am not familiar with the substance of all of those, but we need to make some disposition of it either now or some time later.

MR. HART: In fact, we have just filed a written response to their motion that we can pass up to the Court if you'd like.

Your Honor, as part of the response to this [p. 11] motion, we have tendered to the Clerk's Office a new original affidavit which would be styled in this case by Ms. Betty Jackson which authenticates that these exhibits were received in Senator Rice's office. It reiterates, however, we are not attempting to assert in this case that these studies are part of the formal legislative history of the 1994 act. These were produced, we know at least in

their office, by 1995. The reason that we submitted them in this case and the reason that their motion to strike is inappropriate is that they are relevant and responsive to the Nashville plaintiff's statement of fact number one.

Direct your attention to the second page of our response. We have set forth that statement of fact, which is there is no convincing evidence that sexually-oriented businesses create certain secondary effects. Statement number seven is not limited to what was introduced before the legislature in consideration of Chapter 542. If we look at the very next statement of fact, number eight, they basically repeat number seven but put that qualifier in that was presented to the State of Tennessee during consideration of Chapter 542. Elsewhere throughout the statement of facts and the statement of contested facts, the plaintiffs have limited their factual assertions to the evidence was not presented to the State of Tennessee during consideration of Chapter 542.

[p. 12] The way we read this allegation in statement number seven is just there does not exist anywhere in general evidence that sexually-oriented businesses create deleterious secondary effects on the community.

These exhibits are what we produced to rebut that general proposition. We submit that if indeed now it appears that the plaintiffs are arguing we didn't mean that in number seven, we didn't mean that there does not in general exist any proof of secondary effects, if that's the case then indeed these studies may not be relevant if the only issue is what was expressly presented to the legislature for consideration.

And we also submit that in addition to their statement of facts, they have submitted an affidavit of a land use expert, Mr. McLaughlin. In his affidavit he also reviews some of these studies and perhaps other studies from other jurisdictions and attempts to explain or rebut them and say that well, they do not present any convincing proof of deleterious secondary effects associated with certain sexually-oriented businesses. Again, he does not attach the studies that he's rebutting to his affidavit, and we submit that these are also relevant to for the Court to consider in addressing the question of whether in general there is any proof that sexually-oriented businesses create deleterious secondary effects on the [p. 13] community. and we submit that to the extent there is a technical defect with presenting Ms. Jackson's affidavit from the other case, that has and can be remedied by allowing in a new original affidavit of hers verifying these studies.

THE COURT: All right. The government says that, if I understand that statement, that the exhibits are responsive to one of the plaintiff's undisputed statements of fact, and if in fact the, quote, undisputed statement of fact is narrowed to include only the 1994 act, then these exhibits may not be relevant to that response.

They do suggest that they are relevant to Mr. McLaughlin's affidavit or studies. I am not familiar with that. What do you say, Mr. Graves?

MR. GRAVES: Your Honor, I didn't prepare and Mr. Pleasants is in federal court in Memphis today and couldn't be here. Mr. Shafer was going to do the argument anyway. But and while I didn't prepare it, I was there at the legislature when they passed the 1995 act

having to do with some adult book stores and litigation, and that's when these studies were in Senator Rice's office. But they weren't introduced in 1994. In fact, nothing is introduced in 1994.

THE COURT: I think Mr. Hart would agree with you on that. I don't think that's in dispute.

[p. 14] MR. GRAVES: And for that reason, they are irrelevant because when you are looking at –

THE COURT: Well, it may be, but you have to – what he is saying is the local rules require you to itemize the undisputed statements of fact upon which you rely in your motion, and so the plaintiff set forth certain undisputed facts. They say they are undisputed.

The defendant then must address those in its response to your motion. And it did so by saying this fact is disputed because the statement of fact which you allege to be undisputed does not have a time limitation on it. It says basically there is no convincing documented evidence that sexually-oriented businesses and such and such and such and such. So he is saying well, there are some. They may not have risen until 1995, but they rebut that statement. Is that a fair statement?

MR. HART: Your Honor, I would also add that the studies were out there. They were pre-'94 studies, but the legislature did not have them.

THE COURT: I understand.

MR. GRAVES: I am going to let Mr. Shafer answer that because I know about the 1995 litigation and that those studies were just found in a file and weren't even brought to the attention except one senator says

Senator Rice gave me some studies, I looked at one of them, was [p. 15] bored and I didn't read any more.

THE COURT: Well, they may not be relevant to the passage of this statute. I am not sure Mr. Hart is even arguing that, but they may be relevant to rebut this, quote, undisputed fact without a time reference.

MR. GRAVES: But when we go back to *Renton versus Playtime Theaters,* it says that the evidence of studies must be relevant to the ordinance being passed, and so we've got to look at that. It must relate to the time of the passage of the ordinance was being considered by that body and so that they could rely upon studies of other cities or states.

THE COURT: Okay, Mr. Shafer.

MR. SHAFER: Just a couple of quick comments, Your Honor. I believe particularly given this Court's earlier comment about the lack of direction from the Sixth Circuit that there is probably for all of us a significant question as to really what is the fundamental issue in this case. Are we really talking about Justice Souter's concurring opinion, or really talking about *Renton* or really talking about the Chief Justice's plurality opinion in *Barnes* so what really is the focus of the case.

When those statements of material fact were submitted – and I believe that mine in that regard was just a recapitulation of what Mr. Graves had submitted [p. 16] earlier – there was a question as to exactly where the State was going to come from with regard to all of these issues. It now seems clear, at least to me, that the argument is is that we really have to deal with Justice Souter's

concurring opinion and, therefore, we analyze this pursuant to *Renton*. Consequently the whole issue of whether or not there are studies out there is irrelevant. The only relevance to this particular case is with that question of material fact, therefore, the question is irrelevant and any response to it would also be irrelevant.

The only true question with regard to at least the *Renton* analysis is probably, as I believe this court submitted in its order concerning the discovery motions that had been previously submitted, and that is the question of what was reasonably relied upon. And we know the answer to that. There were no studies. And so for that reason, not to cloud the whole issues, if the Court was to deny both motions for summary judgment, Mr. McLaughlin would sit up here on the witness stand ultimately at trial and he could start talking about all these studies in detail and the fact that they do not support or stand for what Mr. Hart claims they stand for.

And you also have to remember the way that these were submitted to the Court was not here is this affidavit, this is why this affidavit says what we believe it to say, [p. 17] this is why we believe that it supports. All we have is an affidavit here are these studies; these were submitted for another bill. So we don't even have an explanation in front of the Court as to exactly what the studies would be.

I would be more than happy to submit Mr. McLaughlin for two days of testimony on the stand as to the fact that those studies don't say what the State says they say, but that's irrelevant. We don't have to go into that because we're dealing, if anything, with regard to

secondary effects, what was reasonably relied upon. And we know pursuant to their answers of the other questions that there were no studies submitted so it is a spur – as the arguments are now directed I believe by both parties, it is a spurious question of material fact, and it is spurious response. And so not to clutter everything –

THE COURT: You want to change your statement of material fact?

MR. SHAFER: We want to just withdraw that one, and we would rely on the question with regard to what was submitted. Same question. Just ask the question anything submitted.

THE COURT: All right, why don't you make a note, Mr. Graves, or one of you to strike statement of fact number seven. Was it repeated in others, Mr. Hart?

MR. HART: Your Honor, these studies were only [p. 18] presented in response to number seven, although this was repeated in Mr. McLaughlin's affidavit, and I think we would submit that to the extent the Court intends to rely upon Mr. McLaughlin's effectual –

THE COURT: I don't know whether I am or not, but don't just throw a lot of stuff up against a wall and expect me to go and analyze all of Mr. McLaughlin's and pick out of 388 pages something that might respond to something that he said. So what we're going to do is the plaintiffs are going to strike statement number 7. That will make your 388 pages irrelevant. Now, if you believe a portion of that is responsive to something else and you want to submit it for that purpose with a rifle, then do that and we'll look at it in that way.

MR. HART: Thank you, Your Honor.

THE COURT: Any questions about that?

MR. SHAFER: No, Your Honor.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION	§ § § § §	MDL DOCKET NO. 1031 ALL CASES JUDGE ECHOLS

WITHDRAWAL OF STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 8 (b) (7)

COME NOW, the Nashville Federal Plaintiffs and confirm the oral withdrawal of the Nashville Federal plaintiffs' Statement No. 7 of their Statement of Material Facts pursuant to Local Rule 8 (b) (7). Said Plaintiffs at the hearing before this Court on March 25, 1996, orally withdrew their Statement No. 7 of Material Facts and confirm said withdrawal by this pleading.

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By: /s/ Michael F. Pleasants

CERTIFICATE OF SERVICE

I certify a copy of the foregoing has been mailed to counsel for all parties this 29th day of March, 1996.

/s/ Michael F. Pleasants

APPENDIX

"K"

PUBLIC CHAPTER NO. 542

SENATE BILL NO. 1399

By Rice, Jordan, Gilbert, Crowe, Leatherwood, Elsea, Patten, Person

Substituted for: House Bill No. 1152

By Fisher, Stamps, Byrd, Pinion, Stockburger, Wood, Haley, Ramsey, Shirley, Joyce, Walley, Collicott, Hassell, Halteman Harwell, Knight, Owenby, Duer, Cole (Carter), Yenable, Allen, Peroulas Draper

AN ACT To amend Tennessee Code Annotated, Section 39-13-511, to create the offense of public indecency.

WHEREAS, it is a lawful purpose of the General Assembly of the State of Tennessee to enact laws to protect and promote the general welfare, health, safety and morals of its citizens; and

WHEREAS, The General Assembly is empowered to enact such laws pursuant to its charter and the general laws of the State of Tennessee; and

WHEREAS, The Supreme Court of the United States has held that public nudity can be constitutionally proscribed, including so-called nude barroom dancing; and

WHEREAS, The Supreme Court has found that a substantial governmental interest exists in protecting societal order and morality and that because of this governmental interest, a law aimed at regulating public conduct, i.e., nudity, is constitutionally permissible despite its incidental impact on nude dancing; and

WHEREAS, The courts have found that nude dancing establishments are frequently used for unlawful sexual activities, including prostitution, and that such activity

encourages prostitution, sexual assaults and attracts other criminal activity; and

WHEREAS, There is convincing documented evidence that sexually-oriented businesses including nude dancing establishments, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and

WHEREAS, It is recognized that sexually-oriented businesses including nude dancing establishments have serious objectionable operational characteristics thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and

WHEREAS, The General Assembly desires to minimize and control the above mentioned adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight; and

WHEREAS, The purpose or intent of this act is to regulate public conduct and the public commercial exploitation of sex, without any express or implied intent to suppress or prohibit any legitimate speech or expression.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 39-13-511, is amended by inserting the following as a new

subsection (a) and redesignating the existing subsection (a) as subsection (c):

(a) A person commits an offense:

(1) who, in a public place, as defined in subsection (b)(2), knowingly or intentionally:

(A) engages in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions or other ultimate sex acts;

(B) appears in a state of nudity; or

(C) fondles the genitals of himself, herself or another person; or

(2) A person does not violate this subsection if such person makes intentional and reasonable attempts to conceal himself or herself from public view while performing an excretory function and such person performs such function in an unincorporated area of the state.

(b) As used in this act:

(1) "Nudity" or "state of nudity" means the showing of the bare human male or female genitals or pubic area with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the covered male genitals in a discernibly turgid state. A mother in the act of nursing her baby shall not be included within this definition.

(2) "Public place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed

by members of the public. Public places include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal or similar organizations. Premises used solely as a private residence whether permanent or temporary in nature shall not be deemed to be a public place. Public place shall not include enclosed single sex public restrooms, enclosed single sex functional showers, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctor's offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor shall it include a person appearing in a state of nudity in a modeling class operated by: (1) a proprietary school, licensed by the State of Tennessee; a college, junior college, or university supported entirely or partly by taxation; or (2) a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation or an accredited private college. Public place does not include a private facility which has been formed as a family-oriented clothing optional facility, properly licensed by the state.

(d) Public Indecency is punishable as follows:

(1) A first or second offense is a Class B misdemeanor punishable only by a fine of five hundred dollars ($500).

(2) A third or subsequent offense is a Class A misdemeanor punishable by a fine of one thousand five hundred dollars ($1,500) or confinement for not more than eleven (11) months and twenty-nine (29) days or both.

If a person is arrested for public indecency while working as an employee or a contractor, the employer or principal may be held liable for a fine imposed in this act.

The employer may not be held liable under this section unless it is shown the employer knew or should have known of the acts of their employee or contractor is in violation of this statute.

(2) Indecent exposure, as defined in subsection (c), is a class B misdemeanor, unless the defendant is eighteen (18) years of age or older and the victim is under thirteen (13), in which event indecent exposure is a class A misdemeanor.

( ) The provisions of this act shall not apply to any theatrical production which contains nudity as defined by this section performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit; provided such production is not in violation of Tennessee Code Annotated, Title 39, Chapter 17, Part 9.

SECTION 2. Tennessee Code Annotated, Section 39-13-511, is amended by inserting the language "as

defined in Section 39-11-106(29)" between the words "public place" and the word "or on the private" in subsection (a) of the present law, redesignated as subsection (c) by Amendment No. 6.

SECTION 3. This act shall not affect in any fashion the ability of local jurisdictions or the State of Tennessee to regulate any activity where alcoholic beverages, including malt beverages, are sold for consumption.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, then all provisions and applications of this act are declared to be invalid and void.

SECTION 5. This act shall take effect July 1, 1994, the public welfare requiring it.

PASSED: February 3, 1994

/s/ John S. Wilder
JOHN S. WILDER,
SPEAKER OF THE SENATE

/s/ Jimmy Naifeh
JIMMY NAIFEH, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 14th day of February 1994

/s/ Ned McWherter
NED McWHERTER, GOVERNOR

APPENDIX

"L"

39-13-511. Public indecency – Indecent exposure. – (a)(1)(A) A person commits the offense of public indecency who, in a public place, as defined in subdivision (a)(2)(B), knowingly or intentionally:

(i) Engages in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions or other ultimate sex acts;

(ii) Appears in a state of nudity; or

(iii) Fondles the genitals of such person, or another person.

(B) A person does not violate this subdivision (a)(1) if such person makes intentional and reasonable attempts to conceal such person from public view while performing an excretory function, and such person performs such function in an unincorporated area of the state.

(2) As used in subdivision (a)(1):

(A) "Nudity" or "state of nudity" means the showing of the bare human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the covered male genitals in a discernibly turgid state. "Nudity" or "state of nudity" does not include a mother in the act of nursing the mother's baby; and

(B) "Public place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. "Public places" includes, but is not limited to, streets, sidewalks, parks, beaches, business and commercial

establishments (whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal or similar organizations. Premises used solely as a private residence, whether permanent or temporary in nature, are not deemed to be a public place. "Public places" does not include enclosed single sex public restrooms, enclosed single sex functional showers, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctors' offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor does it include a person appearing in a state of nudity in a modeling class operated by a proprietary school, licensed by the state of Tennessee, a college, junior college, or university supported entirely or partly by taxation, or a private college or university where such private college or university maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation or an accredited private college. "Public place" does not include a private facility which has been formed as a family-oriented clothing optional facility, properly licensed by the state.

(3) Public indecency is punishable as follows:

(A) A first or second offense is a Class B misdemeanor punishable only by a fine of five hundred dollars ($500); and

(B) A third or subsequent offense is a Class A misdemeanor punishable by a fine of one thousand five hundred dollars ($1,500) or confinement for not more than eleven (11) months and twenty-nine (29) days, or both.

(4)(A) If a person is arrested for public indecency while working as an employee or a contractor, the employer or principal may be held liable for a fine imposed by this subsection.

(B) The employer may not he held liable under this section unless it is shown the employer knew of should have known the acts of the employee or contractor were in violation of this statute.

(5) The provisions of this subsection do not apply to any theatrical production which contains nudity as defined by this section performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit; provided, that such production is not in violation of chapter 17, part 9 of this title.

(6) This subsection shall not affect in any fashion the ability of local jurisdictions or the state of Tennessee to regulate any activity where alcoholic beverages, including malt beverages, are sold for consumption.

(b)(1) A person commits the offense of indecent exposure who, in a public place as defined in § 39-11-106

or on the private premises of another, or so near thereto as to be seen from such private premises:

(A) Intentionally:

(i) Exposes such person's genitals or buttocks to one (1) or more persons; or

(ii) Engages in sexual contact or sexual penetration as defined in § 39-13-501; and

(B) Reasonably expects the acts will be viewed by another and such acts:

(i) Will offend an ordinary viewing person; or

(ii) Are for the purpose of sexual arousal and gratification of the defendant.

(2) "Indecent exposure," as defined in subdivision (b)(1), is a Class B misdemeanor, unless the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, in which event indecent exposure is a Class A misdemeanor. [Acts 1989, ch. 591, § 1; 1990, ch. 980, § 33; 1994, ch. 542, §§ 1-3.]

APPENDIX

"M"

39-11-106(29) "Public place" means a place to which the public or a group of persons has access and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place.

APPENDIX

"N"

Part 9 – Obscenity

39-17-901. Definitions. – The following definitions apply in this part, unless the context requires otherwise:

(1) "Actual or constructive knowledge": a person is deemed to have constructive knowledge of the contents of material who has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material;

(2) "Community" means the judicial district, as defined in § 16-2-506, in which a violation is alleged to have occurred;

(3) "Distribute" means to transfer possession of, whether with or without consideration;

(4) "Excess violence" means the depiction of acts of violence in such a graphic and/or bloody manner as to exceed common limits of custom and candor, or in such a manner that it is apparent that the predominant appeal of the material is portrayal of violence for violence's sake;

(5) "Final judgment" or "conviction" means all direct appeals have been exhausted including an application for appeal or for certiorari to the Tennessee or United States supreme court;

(6) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse when the matter or performance:

(A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) Taken as whole lacks serious literary, artistic, political or scientific values for minors;

(7) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture film, videocassette or other pictorial representation, or any statue, figure, device, theatrical production or electrical reproduction, or any other article, equipment, machine or material that is obscene as defined by §§ 39-17-901 – 39-17-917;

(8) "Minor" means any person who has not reached eighteen (18) years of age and is not emancipated;

(9) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state;

(10) "Obscene" means:

(A) The average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(B) The average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and

(C) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value;

(11) "Patently offensive" means that which goes substantially beyond customary limits of candor in describing or representing such matters;

(12) "Prurient interest" means a shameful or morbid interest in sex;

(13) "Sadomasochistic abuse" means flagellation or torture or physical restraint by or upon a person for the purpose of sexual gratification of either person;

(14) "Sexual conduct" means:

(A) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of ultimate sexual acts, anal, oral or genital. "Ultimate sexual acts" means sexual intercourse, anal or otherwise, fellatio, cunnilingus or sodomy; or

(B) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals; and

(15) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal. [Acts 1989, ch. 591, § 1; 1990, ch. 1092, §§ 1-3.]

APPENDIX

"O"

3-2-107. Fiscal notes for revenue bills – Cumulative fiscal notes during session. – (a)(1) Fiscal notes shall be provided for all general bills or resolutions increasing or decreasing state or local revenues, making sum-sufficient appropriations, or increasing or decreasing existing appropriations or the fiscal liability of the state or of the local governments of the state. Not more than seven (7) days following the introduction of any such bill or resolution, the fiscal review committee shall furnish to the chief clerk of the house or houses of introduction a statement of analysis of the fiscal effect of such bill or resolution and shall prepare and distribute copies of the statement to members of the general assembly. Within seven (7) days following receipt of a request from a member of the general assembly for a fiscal note on any proposed bill or resolution requiring a fiscal note, the fiscal review committee shall prepare a fiscal note statement to accompany such proposal at the time of introduction. Within twenty-four (24) hours following a request by the sponsor of an amendment to any pending measure on which a fiscal note is required by this section, the fiscal review committee shall prepare for the sponsor a fiscal note showing what effect the amendment would have on the estimates made in the fiscal note which applies to the bill or resolution. In regard to any bill or resolution affecting local government, the director of the division of local finance in the office of the comptroller of the treasury is directed to provide to the fiscal review committee, upon request, the information necessary to determine the fiscal effect of such bill or resolution.

(2) The fiscal note shall, if possible, include an estimate in dollars of the anticipated change in revenue, expenditures, or fiscal liability under the provisions of the bill or resolution. It shall also include a statement as to the immediate effect and, if determinable or reasonably foreseeable, the long range effect of the measure. If, after careful investigation, it is determined that no dollar estimate is possible, the note shall contain a statement to that effect, setting forth the reasons why no dollar estimate can be given. The fiscal note statement shall include an explanation of the basis or reasoning on which the estimate is founded, including any assumptions involved.

(3) No comment or opinion shall be included in the fiscal note regarding the merits of the measure for which the note is prepared; however, technical or mechanical defects may be noted.

(b) A cumulative fiscal note shall be prepared weekly by the fiscal review committee and a copy shall be distributed to each member of the general assembly each week while the general assembly is in session. The cumulative fiscal note shall show the cumulative increase or decrease of revenue or expenditures as caused by legislation enacted from the beginning of the session then convened. [Acts 1963, ch. 113, § 1; 1965, ch. 156, §§ 1, 2; 1967, ch. 209, § 1; 1969, ch. 92, § 1; 1974, ch. 539, §§ 1, 2; 1977, ch. 89, § 20; T.C.A., § 3-207.]

APPENDIX

"P"

RULE 8. PLEADINGS, MOTIONS, BRIEFS, SUMMONSES, SUBPOENAS, ETC.

* * *

(b) Motions.

* * *

(7) *Motions for Summary Judgment.*

* * *

b. In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Federal Rules of Civil Procedure shall be accompanied by a separate, concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by specific citation to the record. After each paragraph, a blank space shall be provided reasonably calculated to enable the non-moving party to respond to the assertion that the fact is undisputed.

c. Any party opposing the motion for summary judgment must respond to each fact set forth by the movant by either (i) agreeing that the fact is undisputed; (ii) agreeing that the fact is undisputed for the purpose of ruling on the motion for summary judgment only; or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. The response must be made on the document provided by the movant or on another document in which the non-movant has reproduced the facts and citations verbatim as set forth by the movant. In either case, the non-movant must make a response to each fact set forth by the movant immediately below each fact set forth by the movant. If the movant has not provided sufficient space to enable

the non-movant to respond, the non-movant may attach a separate sheet or sheets of paper. Such response shall be filed with the papers in opposition to the motion for summary judgment.

In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute.

d. If the non-moving party has asserted additional facts, the moving party shall be allowed to respond to these additional facts by filing a reply statement in the same manner and form as specified in section (c) above. The reply of the moving party shall be filed within ten (10) days of the filing of the response of the non-moving party.

* * *

APPENDIX

"Q"

EXHIBIT R

IN THE CRIMINAL COURTS OF SHELBY COUNTY TENNESSEE

STATE OF TENNESSEE
vs.
DEBORAH RAGGERT

No. 91-4787, 91-4788
INDECENT EXPOSURE

ORDER DISMISSING INDICTMENTS

This matter was heard by the Court on September 15, 1991 upon a Motion to Dismiss Indictment and Supporting Brief filed by Counsel for the Defendant, submission of minutes of the Penal Reform Subcommittee, by both parties, and statements and arguments of both parties.

Defendant sought to dismiss indictment on three grounds: (1) unconstitutionally void for vagueness, (2) Conduct such as described in the affidavits of complaint is not the type of conduct sought to be proscribed by the statute and thus not with in the clear legislative intent, and (3) there is no violation of the statute even if all the allegations are taken as true. The statute attacked is T.C.A. 39-13-511, Indecent Exposure

The Court finds from the legislative history provided, Minutes of the Penal Reform Subcommittee, February 25, 26, 1988, that members of the committee were informed by the Attorney General appearing before them that the "proposal was not intended to cover pornographic or obscene behavior at bars or adult clubs as that conduct is addressed elsewhere in the Tennessee Code."

The Court further finds that even assuming all allegations of the affidavit of complaint are true that a case

that a case [sic] of Indecent Exposure is not made out because patrons of topless establishments go there to view such conduct as described and therefore the dancer could not reasonably expect to offend the ordinary viewing person in the club as required by section (1)(A).

Both indictments therefore stand dismissed on grounds (2) and (3) of the motion of defendant, IT IS SO ORDERED.

/s/ Illegible
JUDGE
11/4/91
DATE

A TRUE COPY ATTEST
DATE 11-4-91
NAME Sandra Illegible
CRIMINAL COURT CLERK

APPENDIX

"R"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE	)	MDL DOCKET
OF TENNESSEE	)	NO. 1031
PUBLIC INDECENCY	)	ALL CASES
STATUTE	)	JUDGE ECHOLS
LITIGATION	)	

EXHIBIT TO PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

TRANSCRIPT OF LEGISLATIVE HISTORY OF 1994 TENN. PUB. ACTS 542
PREPARED BY LEGISLATIVE RESEARCH, INC.
INCLUDING PROPOSED AMENDMENTS

Submitted:

/s/ Steven A. Hart
STEVEN A. HART, Special Counsel
BPR# 7050
Office of the Attorney General
450 James Robertson Parkway
Nashville TN 37243-0485
(615) 741-3505

LEGISLATIVE HISTORY TRANSCRIPT

AFFIDAVIT

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

Dorothy S. Beeler, on oath, states:

1. She is Secretary-Treasurer of Legislative Research, Inc., a Tennessee corporation with offices at 121 21st Avenue North, Suite 207, Nashville, Tennessee 37203. Legislative Research, Inc. is in the business of, among other things, providing to attorneys and other interested parties transcriptions of hearings and proceedings conducted by the Tennessee Legislature and committees thereof as an aid in determining legislative history of acts passed by the Legislature.

2. In the ordinary course of business of Legislative Research, Inc., I have obtained tape recordings from the Tennessee State Library and Archives of the proceedings of standing committees and of the House and Senate sessions in which legislators discussed proposed legislation which became Public Chapter 542 of 1994. Attached hereto are verbatim transcriptions of such proceedings which I prepared. I did not prepare transcripts of Senate Tape S-88, Senate Floor session, May 3, 1993 nor of House Tape H-3, House Floor session, January 13, 1994, because these tapes did not contain any material on legislation which became Public Chapter 542 of 1994.

/s/ Dorothy S. Beeler
DOROTHY S. BEELER

Sworn to and subscribed before me this 4 day of August, 1995.

/s/ Pam Illegible
NOTARY PUBLIC

My Commission expires:

3-23-96

* * *

Clark: Mr. Chairman, let me inquire. The ruling is that no motion was made, is that correct? OK. Rep. Fisher, Mr. Chairman, members of the committee, is, is absolutely correct in everything that he had to say about this bill. The fact is that we have studied this bill for the last two or three months now. Nothing is being crammed down anybody's throat, and certainly no one is is has been left in the dark or something come up suddenly for them to consider. Everyone has had ample opportunity to consider this piece of legislation. I dare say that every member of this committee knows exactly what they're going to do with this bill. Now, the, the fact is, Rep. Fisher alluded to, the fact is that what this bill is intended to get at, is the bars and and after hours clubs where there are nude dancing and so forth. And every police officer and prosecutor in the city of Nashville knows that these clubs are for lack of a better term let's just say rampant with drugs and prostitution. Those clubs are, and that's what this bill is intended to get at. And, and properly does get at. We can talk about the constitutionality of it. We can talk about whether or not it covers universities or schools where there's not a separated shower. All of those things, each of us knows, are possible objections to the bill, but if we seriously look at it based upon our philosophical beliefs, and the people who are against this bill, I have the greatest respect for. They're just philosophically are at a different point possibly than I am. But, and, and that doesn't necessarily make them right, doesn't make me right, but, but the fact is we're up here to vote. And we're up here to make decisions. We've had

ample time to make decisions on this bill. We need to vote on the bill either up or down, and I'd move the question on, on the amendment.

* * *

Phillips: Rep. Fisher, you're recognized on 1152.

Fisher: Thank you, Mr. Chairman, and members of the commission (sic). This is what has been affectionately referred to as the nude dancing bill. We would request, both Rep. Stamps and myself, that this bill be moved back to the floor.

* * *

Wilder: Sen. Rice.

Rice: I certainly appreciate that concern and the concern of everyone. I believe that the strong ordinances that the townships, the counties, the cities have should take care of that and also this would be just the beginning. We could go on with additional bills to meet this need.

Wilder: Sen. Rochelle.

Rochelle: Well, my question is have you looked to other states? I know there's an effort across the country to address these types of businesses because of the problems that follow them. Have you looked at anywhere else to see what has been the consequences of, of these types of bills, where, as I understand it, they outlaw nudity but they legalize some scantily clad person dancing or serving drinks or whatever. That's my question as to whether or not it does make them legal for a liquor license, and what has been the experience in other states as to whether it does result in these types of, of

businesses going to the suburbs them, where there's less likelihood of, of concentrated law enforcement.

Wilder: Sen. Rice.

Rice: Sen. Rochelle, I'm not sure, but isn't it legal for these clubs to open up now, these scantily clad dance clubs? I am familiar with the Indiana law, where they passed it to outlaw nudity, and I have heard absolutely nothing as far as this type of club moving in. They've taken care of that in Indiana, in Gary, Indiana with this bill, this type of bill.

Wilder: Sen. Koella.

Koella: Sen. Rochelle, I evaluate from your speech that you have been going around to different states to look at this proposition?

Wilder: Sen. Rochelle, you may respond.

Rochelle: Sen. Koella, I can't say that I've ever been in one of these establishment, and I don't know that if I had, I would admit it. But I don't, I would say to you, though, that while this is a topic that, that has drawn attention that Sen. Koella, for instance, who represents a suburban area of Knoxville, all across, even those of you who represent downtown areas of Knoxville or Chattanooga or Memphis or Nashville, you have other areas in your district too, and I think you understand that the, the issue that was raised in this last week's newspaper is one that we should consider. If this means by, by closing the nudie bars in downtown Nashville, does, that means that it makes it profitable to put a bikini club in Hendersonville, Sen. Wright, or a scantily clad whatever you call it club in Ashland City, across the line, where

there's a sheriff's department and very little in the way of police protection, that is, that will have an impact on our districts, and it will have an impact because if you put a club like this, similar to this, in those areas where there's not regular and concentrated law enforcement, and where the cities don't have the lawyers that want to go to the Supreme Court on every issue, if that results, you end up with the bikini clubs when the cops aren't around just becoming what you've got right now in the downtown areas, where it's able to be regulated. I think that the newspaper raised an issue that should be of concern and particular concern to the sponsor because her, her area represents a military base and other such places as that, where, if this is going to happen, it's going to cause more problems for the people we represent. I'm just, I guess my concern is because it was, it was suggested in a, at a reputable source, possibly not always reliable, but reputable source, that this was a consequence in other states. That I'd like to have some assurance that someone has at least looked into it and refutes that source, and says that that is not a consequence of, of what is happening. To say this is the first step, I don't know that the city of Mt. Juliet has a budget large enough to finance the types of lawsuits that these places generate. They can't just file suit against everybody that opens up a club. Again, I raise the question because I'd like some assurance that this has not been the experience in other states where this has been tried.

* * *

APPENDIX

"S"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:	)	
THE STATE OF TENNESSEE	)	MDL DOCKET
INDECENCY STATUTE	)	NO. 1031
LITIGATION	)	JUDGE ECHOLS
	)	

Deposition of:
NATHAN RIDLEY
Taken on behalf of the Plaintiffs
September 26, 1995

VOWELL & JENNINGS, INC.
Court Reporting Services
900 American Trust Building
301 Union Street
Nashville, Tennessee 37201
(615) 256-1935

[p. 5] (The following exhibits were stipulated to be marked in this deposition:
Exhibit Nos. 1-31, with exceptions of Nos. 19 and 24.)

EXAMINATION

QUESTIONS BY MR. GRAVES:

Q. Please state your name.

A. I'm Nathan Ridley.

Q. And what is your occupation?

A. I'm a lawyer.

Q. And who do you work for?

A. I work for the office of Legal Services for the Tennessee General Assembly.

Q. And would you explain to us what your duties are and what that service is – legislative service?

A. Primarily the role of our office is to write bills and amendments and resolutions for members of the General Assembly.

Q. Are you charged with doing legal research for them or do you do research legal for them?

A. Yes, sir.

* * *

[p. 49] Q. All right.

A. – In the preparation of these documents.

Q. There was a statement in the Legislative history by Representative Fisher who was one of the sponsors that this is what has been affectionately referred to as the "Nude Dancing Bill." Was that your understanding, that this was referred to as the "Nude Dancing Bill"?

A. No, sir. We got so many bills, we just stick with the numbers. If I start giving them all short titles, I can't – we wouldn't be able to keep up with them.

Q. Okay. But I'm talking about if you heard it from members of the legislature that this bill was affectionately referred to as the "Nude Dancing Bill."

A. Yes, sir. I'd know which bills he was talking about.

Q. Okay. But did you hear them referred to as that?

A. Occasionally.

* * *

[p. 54] Q. Okay. I had asked you a question about the legislative intent, that generally you want to do what you can do to affectuate the legislators' intent in the drafting of this.

A. Sure.

Q. Would it be a fair statement that from your understanding and knowledge, an object of Senate Bill 1399 – not necessarily the object, but an object of that law was to preclude nude performance dancing in the State of Tennessee?

A. That was my understanding from listening to the sponsors during the course of the debate, yes, sir.

Q. Would it be a fair statement that that [p. 55] concern was basically the object of the bill?

A. Certainly primary.

* * *

[p. 63] Q. With regard to documents that would be submitted formally to the legislature as a whole or sub-committees, would it be true that your office would have some part of those documents, either putting them together or –

A. Anybody can give anything to a member of the General Assembly and I don't – if this bill had evolved from a study committee, we would have a mountain of paper just as you referred to, but this bill did not, and I

don't know what anybody might have given to a member. I'm not really sure how to respond.

Q. Okay. So obviously this particular document comes out of Senator Rice's file.

A. Yes, sir.

Q. And from what you're telling me, other individual senators might have similar documents that might have been given to them, but you in your office would have no idea.

A. That's right.

Q. Okay. But what about as opposed to what you just told me a minute ago about whether [p. 64] it came out of a study subcommittee? Are there other ways to formally introduce or submit written materials to the legislature as a whole or subcommittees?

A. Sure. A member may provide that materials be included in "The Journal," the formal records of the body, if he or she wants to during the course of debate.

Q. Okay.

A. He can either read them in the record and say, "Mr. Speaker, I'd like to add this to records for House Bill blank."

Q. Are you aware of any such written materials that would have been submitted with regard to the passage of Senate Bill 1399?

A. No, sir.

Q. Okay.

* * *

[p. 85] Q. If the preamble to the bill said it's against the law to appear nude in a certain place in this, that's not a substantive provision of the law. It couldn't be enforced, could it? It has to be in the enacting part of [p. 86] the bill, doesn't it?

A. The preamble, I think, is an effort for members of the legislature to express their intent or background or reasoning for wanting to have the legislation.

Q. That's right. And that's generally understood by members of the legislature too, isn't it?

A. Yes, sir.

Q. And they know that the preamble doesn't become part of the law as to what is or is not a criminal statute?

A. I've learned – I'm not going to speak for all of them. I'm sorry.

Q. But you know it doesn't become part of the law?

A. Yes, sir.

MR. GRAVES: Okay. That's all.

MR. SHAFER: I just have a couple of questions.

RE-EXAMINATION

QUESTIONS BY MR. SHAFER:

Q. If you could look at the preambles for a minute.

A. For the original bill?

[p. 87] Q. No. Here it is, 29.

A. I got you.

Q. Let's go down to the third "whereas" paragraph.

A. Okay.

Q. Do you see that one. And at the very end of that – the end of that "whereas" paragraph, it says, "Including so called nude barroom dancing." Do you see that?

A. Yes, sir.

Q. Okay. And then go down to the very next "whereas" at the very end of it, it talks about nude dancing at the very end of that one. Do you see that one?

A. On the fourth "whereas" clause?

Q. Yes, sir.

A. Okay.

Q. And the very next one below that, the first line talks about nude dancing establishments. Do you see that?

A. Yes, sir.

Q. And the very next preamble after that, the second line down, it says, "Including nude dancing establishments." Do you see that?

A. Yes, sir.

[p. 88] Q. Okay. And the very next preamble after that starting on the first line and continuing onto the second line, it talks about including nude dancing establishments. Do you see that?

A. Yes, sir.

Q. Okay. Would these be examples of what you talked about of the primary object of Senate Bill 1399 to prohibit nude performance dance – examples of the legislative intent?

A. I think the intent is found by starting with Section I. I think they tried to elaborate on it in the preamble, but as this gentleman represented, the statute begins with – the substantive provisions begin further on after the enacting clause.

Q. Uh-huh.

A. By I think in the preamble, any member attempts to expand upon their intent or the intent of entire General Assembly once it is enacted.

Q. Is it a fair statement that this preamble was proposed by Senator Rice?

A. Yes, sir.

Q. And this preamble would have been in the original proposed bill; is that correct?

[p. 89] A. Yes, sir. I don't recall any amendments to the preamble.

Q. That was going to be my point. Even though the bill had numerous amendments, the preamble is never changed?

A. Not in this case, no, sir.

Q. So the preamble that we see in the final bill that was passed is the same preamble that Senator Rice first proposed; correct?

A. So as far as I know, yes, sir.

Q. All right. And you had told me earlier that from your understanding, the primary object of this bill was to prohibit nude performance dance. And my simple question is, with regard to these statements in the preamble, are these examples of, for example, Senator Rice's position of the primary object of the bill to prohibit nude performance dance?

MR. SMITH: Objection. That's been asked and answered.

THE WITNESS: I just think you're going to have to ask – you know, I can draw my conclusion, but I think –

BY MR. SHAFER:

Q. Sure. Well, all right. Well, let's [p. 90] first start with your conclusion.

A. Okay. I think the General Assembly is working on the offense of public indecency, and I think they tried to expand upon that a little bit in the preamble, and I don't know other than their inclusion. I think you have to ask the members, the 17 and 50 votes it takes in the Senate and the House prospectively to get – I guess I'm having – I'm sorry. I'm having a hard time with the question.

Q. Okay. We'll break it down.

A. Okay.

Q. The preamble – you can correct me if I'm wrong, but the preamble is simply not Senator Rice's position in the final adopted bill; correct?

A. Sure, I think that's correct.

Q. It's the general intent of the entire legislature?

A. Just as with any bill, once you get past – it starts out as the sponsor almost has a proprietary interest it, and once it becomes adopted by each of the houses, it become public policy. The whole body has an interest.

Q. Okay. And we talked about before and [p. 91] you testified that an object of the bill was to prohibit nude performance dance; is that correct?

A. I think so.

Q. And would these examples – would these statements of the preambles that we've just gone through, would those be examples of that object, to prohibit nude performance dance?

A. I think so.

MR. SHAFER: That's all I have. You know what? Let me just one ask one last question.

BY MR. SHAFER:

A. If I wanted to determine the specific reasons that certain language appears in various amendments or parts of the bill, that the legislative history, the transcripts of the tape recordings does not give me, would the best way for me to do that be to ask the specific legislators themselves?

A. I think so for a particular amendment.

MR. SHAFER: That's all I've got.

* * *

APPENDIX

"T"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation; JOHN CHRISTOPHER COX; GOOD TIMES INCORPORATED d/b/a MOUSE'S EAR LOUNGE, a Tennessee Corporation, BOB POPE, d/b/a BOB's GOLD CLUB, DENISE BENSON and DELAINA A. CAISE, individually,	)	
Plaintiffs,	)	
vs.	)	No. 3-94-0494
METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE, ROBERT E. KIRCHNER, JR., CHIEF OF POLICE OF THE METRO POLICE DEPARTMENT, and CHARLES W. BURSON, Attorney General for the State of Tennessee,	)	Judge Echols
Defendants.	)	

DEFENDANT CHARLES W. BURSON'S RESPONSE TO THE MOTION FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. PRELIMINARY STATEMENT

* * *

3 and 4. Harm to Others if the Injunction is Granted and The Public Interest

As noted above, the harm facing the plaintiffs if Public Chapter 542 goes into effect July 1, 1994, is neither

irreparable nor substantial. The dancers involved will simply have to add scant clothing to their performances which the Supreme Court noted in *Barnes* does not significantly impact their ability to deliver their message. On the other hand the granting of an injunction will result in continued harm to the individuals impacted by the secondary effects of nude dancing noted in *Renton, supra.*, and by Mr. Justice Souter in the *Barnes* decision, should the activity be allowed to continue unabated.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, et al.,	)	
	)	
Plaintiffs,	)	Civ. No. 3:94-0494
	)	
vs.	)	
	)	Judge Robert L.
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	Echols
	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS AND/OR MOTION FOR SUMMARY JUDGMENT

* * *

The Plaintiffs allege that the transcript from the committee hearings indicate that the statute was targeted

specifically at the nude dancing establishments, and, in support of this proposition, the Plaintiffs cite some of the comments made by legislators on the legislation. However, the instances cited by the Plaintiffs in their brief are only the comments of five legislators, out of a total of 132, and taken from over 140 pages of commentary. In any event, as noted above, both the transcripts from the committee hearings as well as the preamble to the statute indicate that legislators were concerned with nude dancing establishments with regard to the "secondary effects" of such places of businesses and not to the dancing taking place therein.

In arguing that the statute's references to nude dancing means that it was designed to prohibit such dancing, Plaintiffs fail to recognize the critical distinction between the government's constitutionally legitimate interest in preventing the secondary effects that accompany expressive conduct at nude dancing establishments and the impermissible interest in preventing the expressive conduct itself.

* * *

Contrary to Plaintiffs' assertions, Chapter 542 expands rather than restricts the sphere of protection offered to Tennessee citizens by acting as a companion to the present indecent exposure statute. As noted by the Plaintiffs, the Criminal Court of Shelby County has held that the indecent exposure statute was not properly applied to a topless establishment "because patrons of topless establishments go there to view such conduct as described and therefore the dancer could not reasonably expect to offend the ordinary viewing person in the club

as required by section (2)(a)." *State v. Raggett*, Criminal Court of Shelby County, No. 91-4789 and 91-4788, Plaintiffs Exhibit D. Given its present wording, Tennessee's existing indecent exposure statute is not aimed at nor is it effective in furthering the state's interest in protecting citizens from the secondary effects of adult entertainment establishments. These effects do not necessarily affect solely those patrons viewing the nudity, but rather the persons who wish to live, work, or utilize areas of the city where adult establishments that allow nudity are located.

* * *

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation; JOHN CHRISTOPHER COX; GOOD TIMES INC., doing business as Mouse's Ear Lounge, a Tennessee Corporation, BOB POPE, doing business as Bob's Gold Club; DENISE BENSON; and DELAINA A. CAISE, Individually,	)	
Plaintiffs – Appellants,	)	
v.	)	CASE NO. 94-5990
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; ROBERT E. KIRCHNER, JR., Chief of Police of the Metropolitan Police Department; CHARLES W. BURSON, Attorney General, State of Tennessee,	)	
Defendants – Appellees.	)	

APPEAL BRIEF FOR DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

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* * *

Plaintiffs' interpretation of the legislative intent and history is flawed in that they fail to recognize the critical distinction between the government's constitutionally legitimate interest, recognized by this Court in *Triplett Grille,* in preventing the secondary effects that accompany expressive conduct at nude dancing establishments and the impermissible interest in preventing the expressive conduct itself. Under *Renton,* the government may regulate with a view towards minimizing undesired secondary effects even if such regulation has an incidental affect on expressive conduct. Further, under *Renton,* such regulation is deemed to be content neutral and is not subject to the "compelling state interest" test urged by the plaintiffs. *See* Plaintiffs' Brief, p. 17.

In *Renton,* the Supreme Court held that the secondary effects can be separated from the expressive activity for purposes of determining whether the passage of the statute is unrelated to the suppression of free expression. This holding was reiterated by the Court in the case of

R.A.V. v. City of St. Paul, Minnesota, 505 U.S. ___, 112 S.Ct.2538, 120 L.Ed.2d 305 (1992) where the Court stated:

> Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech
>
> * * *

As noted by the Plaintiffs, the Criminal Court of Shelby County has held that the indecent exposure statute was not properly applied to a topless establishment "because patrons of topless establishments go there to view such conduct as described and therefore the dancer could not reasonably expect to offend the ordinary viewing person in the club as required by section (2)(a)." *State v. Raggert*, Criminal Court of Shelby County, No. 91-4789 and 91-4788, Plaintiffs Brief, Addendum G. Given its present wording, Tennessee's existing indecent exposure statute is not aimed at nor is it effective in furthering the state's interest in protecting citizens from the secondary effects of adult entertainment establishments. These effects do not necessarily have an impact solely on those patrons viewing the nudity, but rather persons who wish to live, work, or utilize areas of the city where adult establishments that allow nudity are located. Chapter 542, like the statute upheld in *Renton*, is designed to "protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life." 475 U.S. at 48, 106 S.Ct. at 929 (citations omitted).

f. CHAPTER 542'S INCIDENTAL RESTRICTION ON ALLEGED FIRST AMENDMENT FREEDOMS IS NO GREATER THAN IS ESSENTIAL TO FURTHER THE STATE'S INTEREST IN COMBATING SECONDARY EFFECTS.

In *Renton*, the Court held that time, place, or manner restrictions that are designed to curtail secondary effects must leave open "reasonable alternative avenues of communication." 475 U.S. at 50, 89 L.Ed.2d at 39. In the case of nude dancing, the government is simply regulating the manner in which the dancers may convey their message – not because of the content of the message, but because of the secondary effects of conveying it in the nude.

* * *

The legislature's method for distinguishing between these locations has nothing to do with the "views" of the persons in one location or the other. See Plaintiff's Brief, p. 42. Rather, the reason for differentiating between nudity in various contexts is due to the legislature's recognition, set forth in detail in the preamble to the statute, that nudity has different effects on the well-being of the general community in different contexts.

APPENDIX

"U"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:

STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION	**MDL DOCKET NO. 1031** **ALL CASES** **JUDGE** **ROBERT L. ECHOLS**

AFFIDAVIT OF JUDITH LYNNE HANNA

Judith Lynne Hanna, under penalty of perjury under the laws of the States of Tennessee and Maryland, and declares as follows:

1. I am a cultural anthropologist, Senior Research Scholar at the University of Maryland, educator and writer.

2. I earned a bachelors degree in political science from the University of California at Los Angeles in 1958, a masters degree in political science from Michigan State University in 1962, a masters degree in anthropology from Columbia University in 1975, and a doctoral degree in anthropology from Columbia University in 1976. My doctoral dissertation was on dance as nonverbal communication.

3. I have training in dance and have been a dancer since 1946. In addition, I taught dance and about dance at Michigan State University in 1965, the University of Texas at Dallas in 1976, and Fordham University during 1970-1973. I have been a consultant in dance education for New York University; African-American Institute; Peace Corps; New York City Board of Education; School District of Philadelphia; Black Studies Department, City College, City of University of New York; Gill/St. Bernard's High School, Bernardsville, New Jersey; West Dallas Community Center; Disney World; and National Geographic Society. Recognition for my research on dance includes National Endowment for the Humanities-funded public lectures; American Council for Learned Societies; Wenner-Gren, National Science Foundation, American Sociological Association, American Psychological Association, and International Research and Exchanges Board awards; invited keynote addresses; and the W.G. Anderson award for significant publications. I have been an invited speaker on dance at the annual meetings and special symposia of various academic disciplines in the United States, Canada, Europe, and the Caribbean. I have served as an expert court witness in court and through affidavit in Superior Court of Washington, King County, WA; U.S. District Court of Washington, Seattle.

4. Anthropology comprises four (4) separate disciplines: physical anthropology, cultural anthropology, linguistic anthropology, and archeology. Anthropologists most often specialize in one area, but have training in all four. I have specialized in cultural anthropology focusing

on the arts and developing expertise in the study of dance and nonverbal communication.

5. I have conducted field work in the United States and Africa studying the performing arts and society. In my field work, I examined how dance movement, in the context of time, space and effort, like language (which it is), is able to convey messages. I have also studied what messages performers were trying to send, how they did it and what the audience perceived in that communication. In one study, I asked performers what feelings, emotions and ideas they were trying to convey and how they thought these were communicated. I also surveyed the audience to determine what they saw and what the significant cues were to receiving the messages. The coincidence of performers' communication intentions and audience perceptions was a measure of successful communication.

6. Over the years, my writings have been frequently published. I have written four substantial books on dance and about eighty (80) articles on dance in peer-reviewed scholarly journals. My books include: *To Dance is Human: A Theory of Nonverbal Communication,* University of Chicago Press; *Dance, Sex and Gender: Signs of Identity, Dominance, Defiance, and Desire,* University of Chicago Press; *Dance and Stress: Resistance, Reduction and Euphoria,* New York: AMS Press; and *The Performer-Audience Connection: Emotion to Metaphor in Dance and Society,* Austin and London: University of Texas Press. Two additional books are under contract to be published.

7. Attached hereto as Exhibit A is a copy of my Curriculum Vitae.

8. Dance is a language, i.e., a systematic means of communicating ideas or feelings by the use of signs, sounds, and movements having understood meanings and behavior. Definitions of dance are culturally dependent. While the term "dance" has many definitions, as a dancer and anthropologist, I have developed this conceptualization:

Dance is human behavior composed (from the dancer's perspective, usually shared by the audience members of the dancer's culture) of purposeful (individual choice and social learning play a role), intentionally rhythmical, and culturally influenced sequences of nonverbal body movements other than **ordinary** motor activities, the motion (in time, space and with effort, or energy expended) having inherent and "aesthetic" value (notion of appropriateness and competency held by the dancer's culture) and symbolic potential. This concept of dance recognizes a dancer's purpose may be to play with movement itself, to provide an emotional experience, or to conceptualize through movement.

The instrument of dance is the human body; the dancer and the dance are one and the same. By contrast, other arts use objects: e.g., the musician uses a piano to make music, the visual artist uses both brush and paint to make a painting.

In erotic dancing (also called exotic, striptease, table, and couch dancing), the performer uses movement of the body, often simulating culturally-specific rhythms of sexual activity, to suggest, e.g., sexual flirting, foreplay and consummation. A female performer attempts to entice the

audience member(s) through the display of feminine sensuality – and to stimulate an economic transaction with an audience member in exchange. Male performers similarly attempt to entice patrons. The performer-audience connection depends on the dancer receiving feedback to validate the desirability, passion, and adoration she or he must project. Moreover, the patron of dancing may become part of the performance for other audience members in a club, who can identify with the patron. Unpredictable spontaneous exchanges between the performer and patron create entertainment value for everyone.

9. Different forms of dance have different aesthetics. For example, what is appropriate for ballet differs from what is appropriate for tap dancing. Sociologist Gary Alan Fine notes that "Certain forms of dance are privileged by both the dance community and the general public. Classical ballet is privileged. It has established critics, expansive venues, charitable events to support it, well-funded companies, international links, textbooks and theories, schools, professional organizations, and so on. Through its historical development, it has been certified as part of elite culture. Exotic dance has no such infrastructure; its performers do not have powerful networks of support, or cultural capital, that they can draw upon to obtain resources of status. Exotic dance is constrained by its grubby and hasty history just as ballet is ennobled by its ethereal one. Those who work in vineyards of exotic dance are typically seen as lower class, and worse, they lack the pretensions that come with Art. And yet, for their audience, they achieve an emotional and meaningful reaction to which the producers of ballet

can only envy. No one sleeps during burlesque [ancestor of contemporary erotic dance]."

10. Like verbal speech, dance has communicative components. Verbal speech uses the mouth, vocal cords and body language to communicate. Dance uses the body language of movement through time, space and effort as the raw material for kinetic imagery; music and costume may enhance the messages. Dance requires the same underlying faculty in the brain for conceptualization, creativity and memory as does verbal language in speaking and writing. Both forms have vocabulary (steps and gestures in dance), syntax or grammar (rules for putting the vocabulary together) and semantics (meaning). Dance, however, assembles these elements in a manner that more often resembles poetry, with its multiple, symbolic and elusive meanings. Pragmatics (the social, economic, cultural, and historical context in which a communication takes place) applies to verbal and nonverbal forms. As with much linguistic behavior in which an individual creates sentences and responds to them without being conscious of how it is done, dance processes sometimes operate without the dancer's or spectator's awareness of the vocabulary, grammar and semantics of a dance idiom. Dance is invested with meaning: dancers and spectators construe meaning from their personal and cultural experiences. They often engage in nonverbal "communication" as the spectator responds to the dance communication.

11. While some may argue that striptease dance is entertainment and not art, there is no clear line between art and entertainment. *Webster's Ninth Collegiate Dictionary* defines art as "skill acquired by experience, study, or

observation." By this criterion, striptease dance is an art. Some performers have danced in a professional ballet company or competed in gymnastics, while others, with no prior training learn by watching erotic dance and coaching from experienced performers and management.

The media often does not make a clear distinction between art and entertainment. Newspapers regularly place items about ballet in the section called "Entertainment."

Nor is there a clear line of demarcation between "high art", such as the ballet and "low art", such as striptease dancing. Modern dance, at one time considered scandalous, grew out of a rebellion to classical ballet and is now considered "high art".

12. There are many different forms of dance such as ballet, tap, jazz, disco, striptease, Latin, America, and reggae. Each form of dance has its own semantics, vocabulary, syntax, pragmatics, and aesthetics, although there may be some overlap with other genres of dance. Several forms of dance employ nudity and eroticism, including ballet. Former stripper and Ph.D. student, D. Clipperton, says, "Stripping shares with other dance forms the privileging of certain body parts; where ballet focuses on the display of the leg, stripping focuses on breasts, hips, thighs and lips." The aesthetic of striptease dance requires creativity: Dancers compete for the attention of customers who show their appreciation by giving the dancer tips or buying special dances. American culture places a premium on the new. Some dancers draw upon their training in other forms of dance and also gymnastics and cheerleading. They may have a set choreography and

improvise or only make use of movement ideas in response to their own mood, the music, and of most importance, the customer's response.

13. I have been retained by the Nashville Plaintiffs in this case to express an opinion as to the communication, or "message", being expressed by erotic performance dance, and whether such expression would be effected, in any way, by precluding such performers from displaying, at some point in their dance performances, their breasts, genitals and buttocks.

14. In March 1995, I visited six adult cabarets (Club Extasy, Deja Vu Airport, Deja Vu-Lake City, Sugars, Papagayos, and Babes) in the greater Seattle metropolitan area in connection with another legal matter in which I was retained to provide a professional opinion. It is my understanding that the entertainment provided in these clubs are of the same kind, nature, and caliber as that as performed within the Nashville clubs at issue in this litigation; Deja Vu of Nashville, Inc., Mouse's Ear Lounge, and Bob's Gold Club. The establishments were dynamic places, with vital and vibrant music, at least one stage and striptease, table and couch dancing occurring. While in the clubs, I spoke with several performers and managers. I learned about some of the performers' backgrounds, training, the manner in which they earn a living, the economic constraints of a separation requirement on their dance presentations, and their perceptions of the patrons' expectations. Since then, I have visited adult cabarets in Toronto, Chicago and Washington, D.C.; spoken in person with dancers, managers and customers; spoken by telephone with dancers, customers, managers, club owners and researchers on striptease dancing in

several states and Canada, and read reports in master's and doctoral theses, books, and articles on striptease dancing in Atlanta, Boston, Eugene, London, Las Vegas, Montreal, New Orleans, New York, Providence, rural New England, the South, Toronto, and Walnut Creek (California). These works were written by senior scholars, graduate students, journalists, photographers, and former strippers.

15. During visits to adult entertainment clubs, I had an opportunity to view the types of dances performed at Deja Vu Airport, Deja Vu-Lake City and similar establishments throughout the United States. As dances in general, the dances were multisensory experiences. There was the sight of dancers moving in time and space. There were the sounds of physical movements on the floor and body as well as breathing. There was the smell of the dancers' breath, physical exertion and perfume. There was the tactile sense of body parts touching the ground, other body parts, people or props. There was what is called the proxemic sense, that of distance between people. And there was the kinesthetic (feeling of bodily movement and tension) experience or empathy with dancers. Each of these sensory components is essential to conveying the message of the dance.

16. Stage dances, as the name implies, are dances performed on stage for the audience as a whole. The dances serve to showcase the performer and advertise her or him for individual dances. During a stage dance, a performer removes all of personal in a striptease while remaining on the stage. Clothing affects the fantasy of intimacy; along with distance, it is armament that conveys unavailability and/or unapproachability. Clothing

can be a statement about such phenomena as the unnatural, dishonesty, constraint and imprisonment.

The syntax usually has two to three songs during which time the dancer moving in intentionally rhythmical patterns appears clothed as some character/persona, becomes topless and then also bottomless. Dancers create sequences drawing upon such movements or vocabulary as the following:

Locomotion:

strut

walk

shimmy up a pole and leaning back, often holding on with one hand

crawl

jump (restrained by high heels)

split

backbend

cartwheel

somersault into a split

swing leg over customer's head

Gesture:

touch oneself:

run hands over, caress body

toss hair back

lick fingers, lips

pose, preen, pout

make eye contact to engage a customer

gyrate hips and torso

undulate body or body parts

bend torso over

peek through one's legs

snake arms upward

rotate knees toward and away from each other (butterfly)

hinge torso backwards from a kneeling position

extend legs up wall from position on shoulders and upper back

hold foot and extend leg full length

arch back from standing position

bend backward placing hands and toes on floor

extend one leg out to side while bent over at right angle, arms to side

breathe heavily

pretend to be caged

squat with knees turned outward

Level:

stand in pose

knees bent and kneeling

hang on a pole near ceiling

on stage

on runway

table dancing: dancer performs near the customer's table on couch: same as table dancing, but customer sits on a couch

Exposure:

stripteasing (taking off one's clothes in a suggestive manner; sometimes worn are pasties, beaded bra with option tassels, G-string or T-bar, underpants, strip pants, front and back panels, gown, robe, gauntlets [3/4 length gloves], jewelry, heels, hose)

topless

bottomless

flash (move G-string to expose pubic area)

Props:

fan dance (the fan was used to cover the nude body; it was illegal to be nude while moving, but legal if standing; ballerina Sally Rand used a fan because she could not, initially, afford a costume)

tassels (fastened to pasties and made to twirl)

Features:

gimmick or specialty such as fans; imaginary lover; Eve act with boa constrictor; have a man from audience come on stage, dress him in sultan turban and teach him to belly dance; have trained bird remove clothes from stripper and carry them away.

The dance "semantics" include messages of sensuality, intimacy, the illusion of a potential relationship, including an enduring one of a family that produces children, and the beauty of the female body. The "vocabulary" of the dance focuses on movements highlighting secondary sex characteristics such as the breasts, buttocks

and hips in addition to the genitals. The "pragmatics" of the dance, in the context of American society, involve attitudes towards women, changing sexual mores, the lack of satisfactory marital and other sexual relationships, the opportunity to be temporarily naughty through the risque excitement of a harmless transgression since it is "naughty" to look at nude women, and an economic transaction between the dancer and customer. The "aesthetic" of the dance focuses on flexibility and creativity in movement, physical appearance of the dancer, musicality, and the range of possibility in the movement skills.

17. Table dances are dances performed by clothed (or initially clothed) performers in front of an individual audience member at his or her table. The performer focuses on an individual audience member and the particular customer's responses in order to give a personal message not manifestly intended for the audience as a whole. The message of "I am for you and you alone" permits the individual customer a fantasy of assignation, possession, foreplay, and consummated relationship. Some customers get the personal attention of an attractive female who would not otherwise relate to them or "give them the time of day"; some customers are reminded of what it is to be desired. Consequently, the table dances create a sense of intimacy and spontaneity not found in a stage dance. There is a different semantic involved in table dances inasmuch as there is greater multisensory interaction and eye contact between the individual audience member and the performer. This different and personal message is conveyed through proximity. Close physical distance is itself a sign of attraction

and often bespeaks of eros. Propinquity permits the collection in information that enhances communication. The dancer and customer must be able to "read" each other: indicators of attraction and satisfaction include the mouth position, eye brightness, pupil dilation and expansion, facial color, breathe, and perspiration. The message of the dance is personal interest in and understanding of the customer, eroticism, desire, allure, promise of ecstasy, and the beauty of the body. The dancer is saying, "you're special and important". The entertainer creates an illusion of concern and availability for the customer, and seeks to effect a transformation in the patron's feelings.

18. Like ballet and other stage dances, table dances are purposeful, intentionally rhythmical, and contain notions of appropriateness and competency in the use of the human body in time, space and effort. The language of table dancing is intended to communicate messages of sexuality, intimacy, the illusion of a potential relationship and the beauty of the female body. The syntax of the dance requires specific suggestive movements, and the "vocabulary" of the dance, like stage dances, focuses on primary and secondary sex characteristics. The pragmatics reflect the social body's constraints on the way the body is perceived and responded to in the context of a perceived setting and activity. The "aesthetic" of the table dance, like the stage dance, focuses on flexibility in movements, musicality and the range of movement skills.

19. As mentioned earlier, symbolism is an important component of dance. The symbolism inherent in stage and table dancing is that of a relationship, and the illusion of romance and an intimate sexual experience. The

fantasy can be no strings attached or commitment beyond the financial transaction.

20. As part of my professional responsibilities here, I was asked to assist Professor Edward Donnerstein of the University of California, Santa Barbara, in the design of a study that he was to conduct concerning the communication of erotic performance dance and the effects of numerous variables, including that of nudity, upon such communication. Specifically, I was asked to participate in the drafting of questions that I believed appropriately reflected the intended and perceived expression and/or communication of erotic dance performance. I did, in fact, participate in drafting these questions in consultation with Professor Donnerstein and others.

21. The questions ultimately used for Dr. Donnerstein's study were as follows:

i. Relational communication. "Did you feel that the dancer was expressing to you through her dance the fantasy that:

(a) She wanted to make you feel like you were a special person?

(b) She liked you?

(c) She was personally interested in you?

(d) She desired you?

(e) There was intimacy between the two of you?

(f) She wanted to be romantically involved with you?"

ii. Erotic communication. "The dance was:

(a) Passionate.

(b) Artistic.

(c) Sexy.

(d) Erotic.

(e) Alluring.

(f) Seductive.

(g) Stimulating.

(h) Personal".

iii. Social message. "Did the dancer express to you that:

(a) Women can express themselves as freely as men?

(b) She was free to do what she wanted with her body?

(c) The female body is beautiful?"

22. It is my professional opinion that all of the questions as set forth immediately above accurately reflect the nonverbal expression being communicated by and through erotic dance performance, and are appropriate questions to measure the expressive and communicational components of erotic dance.

23. Notions of sexuality and intimacy are found in all forms of dance, not just stage and table dancing. However, the sexual message of stage and table dancing is made stronger by and focusing on uncovered primary and secondary sex characteristics. If this component is taken away, the message is significantly weakened, and, the content of the expression sought to be communicated by the dance is, indeed, actually significantly changed.

Nudity bespeaks of nature, honesty, innocence, intimacy, fecundity, humiliation, defenselessness, existentialism, liberation, poverty, simplicity or social indeterminacy. The nude dancer is transfused with visible vitality that makes observers aware of their own corporeal presence.

In her Yale University Press book, C. Paglia says of women's nudity, "Every woman's body contains a cell of archaic night, where all knowing must stop. This is the profound meaning behind striptease, a sacred dance of pagan origins . . . . a nude woman carries off the stage a final concealment, that chthonian darkness from which we come." Thus there is an awesomeness about the woman's body, a secret, sacred space. From the female genitals comes all human life.

The communicative important of nudity in erotic dance has to be seen in historical context in our country. What is considered acceptable bodily display in mainstream society has been changing. In the past, a leg was not called a leg but a limb, and it was covered, even for sunbathing and swimming. The amount of flesh that could be displayed inched upward, and now one sees the thigh moving into bare hip. Thong bathing suits reveal all of the buttocks but the division which is covered by a mere thong. Philosopher Francis Sparshott notes that "nakedness or near-nakedness, was established as important to modern dance by Isadora Duncan . . . what Isadora actually emphasized was not the quality of movement; it was the unadornedness of the body itself. The ideal is that of a body-based and therefore natural humanity."

In performing arts theatres, three later landmarks are noteworthy. California-based Anna Halprin's New York City debut in 1967 of "Parades and Changes" occasioned police intervention because of a nude scene. "Hair," a love-rock musical in 1968, brought nudity, including a glance at pubic hair, to a New York City Broadway theater. And, far more than a woman's bare feet (a la Duncan) was seen in the 1970 *Mutations* by Glen Tetley and Hans van Manen. A nude man danced a slow celebratory solo, a nude couple performed an entwining duet, and three naked henchmen moved about.

Of course, it was and remains a prerogative of the arts in Western culture to probe what has been deemed off-limits and to find new things to look at or new ways to look at familiar objects.

The 1960s witnessed a sexual revolution, and sexual imagery permeates contemporary life. In the media, underwear went public, then bodies, simulated sex, frontal nudity and the flaunting of body parts. In the cinema there was a time when one could see only a kiss; now intercourse appears on screen, television and cable.

In the post-Madonna (renowned singer, dancer and actress) era, the esteemed ABC television show "N.Y.P.D. Blue" showed a district attorney and her detective fiance showering together nude last season. And this season, another pair of detectives appear nude, in bed and in sexual simulation.

Thus in the context of contemporary culture, nudity in a private adult cabaret is essential to convey the message of exotic dancing, the metaphor of eroticism. Nobel

Laureate Octavio Paz explains that eroticism as a "representation" diverts or denies sex in action. Eroticism is "sexuality transfigured, a metaphor. The agent that provokes both the erotic act and the poetic act is imagination. . . . eroticism is a metaphor of animal sexuality. What does this metaphor say? Like all metaphors, it points to something that is beyond the reality that gave rise to it, something new and different from the terms that it comprises." Paz says, "Eroticism is, above all else, exclusively human: it is sexuality socialized and transfigured by the imagination and the will of human beings."

24. It is my professional opinion that restrictions on dance that prohibit nudity will have a negative impact on the arts as a whole. Different dance genres influence each other and patrons of one dance form often explore other dance forms. Response of my informants regarding notions of intimacy, privacy and the illusion of a relationship suggest that patrons' expectations will not be satisfied and the audience will be disappointed. Disappointment in the dance because of its inability to convey the expected erotic message will result in fewer dances being performed. Performers do not work for free. They are professionals who work in order to earn a livelihood. If they are unable to earn a living because an audience is unwilling to pay to view a certain performance, there will ultimately be an inhibiting effect on the arts. Performers will not work if they cannot get paid.

25. It is my professional opinion that restrictions on dance that prohibit a performer from exhibiting her breasts, genitals and buttocks would significantly effect all communicative components of exotic dance, including

its semantics, pragmatics, aesthetics, and, most importantly, its vocabulary. The "message" of erotic dance simply would not be the same if entertainers were foreclosed from fully disrobing. It is further my professional opinion that the "message" and communication as expressed by and through erotic dance would be significantly and substantially reduced and degraded if performers were not permitted the freedom to fully disrobe.

26. It is my professional opinion that in the context of erotic dance, nudity is, itself, an expressive component of the dance and is not merely incidental conduct associated therewith.

27. It is my professional opinion that in the context of erotic dance, nudity is, itself, an expressive component of the dance and is not merely the manner in which such dance is performed.

28. It is my professional opinion that the requirement that dance performers wear covering of their genitals, breasts and buttocks significantly and substantially deprives the dance of the erotic message that is sought to be conveyed.

29. I have been asked to render an opinion as to whether the requirement that dance performers wear covering of their genitals, breasts and buttocks simply makes the message as expressed in the dance performance slightly less graphic, as opposed to altering the actual message and content of the expression. It is my professional opinion that this is not the case. Requiring dancers to maintain covering of their genitals, breasts and buttocks directly and unmistakably effects the content of the erotic message sought to be conveyed by the performer.

30. I have been asked to render a professional opinion as to whether, in the context of erotic dance, nudity is simply a noncommunicative element of such dance. It is my professional opinion that this is an erroneous statement. In the context of erotic dance, nudity is an integral part of the content of the expression sought to be conveyed.

Dated at Bethesda, Maryland this 13th day of November, 1995.

/s/ Judith Lynne Hanna
Judith Lynne Hanna

Subscribed and sworn to before me this 13th day of November, 1995.

/s/ Mary B. Aitken
Notary Public
Montgomery County, Maryland
My Commission Expires: July 18, 1998